Editor's note: 99 I.D. 87; Reconsideration granted; decision and order reaffirmed as modified -- 123 IBLA 194A, 100 I.D. 34 (Feb. 9, 1993); aff'd 927 F. Supp. 1411 (June 14, 1996); aff'd, 129 F.3d 1377 (10th Cir. Nov. 25, 1997).

ALFRED G. HOYL

IBLA 91-8 Decided June 3, 1992

Appeal from a decision of the Colorado State Director, Bureau of Land Management, denying application for a 5-year suspension of Federal coal leases C-0127832, C-0127833, and C-0127834.

Affirmed.

1. Coal Leases and Permits: Diligence--Coal Leases and Permits: Termination

   Under sec. 7(a) of the Mineral Leasing Act, as amended, any Federal coal lease which is not producing in "commercial quantities" at the end of 10 years shall be terminated. Production of "commercial quantities" (defined as 1 percent of recoverable coal reserves) must be achieved by the end of the "diligent development period," which is 10 years after lease issuance.

2. Coal Leases and Permits: Suspension of Operations and Production--Mineral Leasing Act: Generally

   Where a mine fire occurs on fee land adjoining a Federal lease, and where the fee land and Federal lease are not part of a logical mining unit, the fire is not a force majeure providing grounds for relief from the terms of the Federal lease. Further, where the lessee fails to prove that the alleged force majeure event was the proximate cause of his nonperformance; that a good faith effort was made to overcome the problem; and that the

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problem was beyond his reasonable control, he is not entitled to relief.

3. Coal Leases and Permits: Suspension of Operations and Production--Mineral Leasing Act: Generally

A Federal coal lease may not be suspended under sec. 7(b) of the Mineral Leasing Act, as amended, recognizing force majeure conditions, due to adverse market conditions.

4. Coal Leases and Permits: Diligence--Coal Leases and Permits: Suspension of Operations and Production--Mineral Leasing Act: Generally

Under sec. 7(b) of the Mineral Leasing Act, as amended, a Federal coal lease is subject to two requirements: diligent development and continued operation. The requirement for continued operation may be suspended under that section "where operations under the lease are interrupted by strikes, the elements, or casualties not attributable to the lessee," that is, by force majeure conditions. The requirement for diligent development, however, may not be suspended by the existence of force majeure conditions under sec. 7(b).

5. Coal Leases and Permits: Suspension of Operations and Production--Mineral Leasing Act: Generally

The only relief available under sec. 7(b) of the Mineral Leasing Act, as amended, where force majeure conditions exist is from the lease requirement that "continued operation" be maintained. In order to achieve "continued operation," a lessee must, inter alia, achieve the production of not less than commercial quantities of recoverable coal reserves in each of the first 2 continued operation years "following the achievement of diligent development." Thus, in order for there to be "continued operation," there must first be "diligent development." Where lessees have not commenced operations on a Federal leasehold, they have not achieved either "diligent development" or "continued operation," so that no relief is available to them under the force majeure provision.

6. Coal Leases and Permits: Diligence--Coal Leases and Permits: Suspension of Operations and Production--Mineral Leasing Act: Environment

A suspension granted under sec. 39 of the Mineral Leasing Act, as amended, "in the interest of conservation" suspends the requirement of sec. 7(a) and (b)

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of the Mineral Leasing Act, as amended, requiring diligent development within 10 years of the date of issuance of the coal lease.

7. Coal Leases and Permits: Suspension of Operations and Production--Mineral Leasing Act: Environment

Sec. 39 of the Mineral Leasing Act, as amended, provides for suspension of a Federal coal lease either (1) as a matter of right where, through some act, omission, or delay by a Federal agency, beneficial enjoyment of a lease has been precluded, such as where delays imposed upon the lessee due to administrative actions addressing environmental concerns have the effect of denying lessee's operator "timely access" to the property; or (2) as a matter of discretion, in the interest of conservation, e.g., to prevent damage to the environment. Where there is no persuasive evidence either of undue delay imposed by administrative actions addressing environmental concerns or of environmental harm, an application for suspension under sec. 39 is properly denied. The fact that a substantial investment of funds was made in three Federal leases does not create any cognizable right to retain the leases indefinitely. To the contrary, in the Federal Coal Lease Amendments Act, Congress required timely development of the leases on pain of termination.

8. Coal Leases and Permits: Rentals--Coal Leases and Permits: Suspension of Operations and Production--Mineral Leasing Act: Rentals

A Federal coal lessee's obligation to pay rental may be suspended under sec. 39 of the Mineral Leasing Act, as amended, as interpreted by Departmental regulation 43 CFR 3485.2(c), if he submits detailed supporting information, including (among other things) facts indicating whether the mine can be successfully operated under the existing lease terms. A request for suspension that does not comply with that regulation is properly rejected.

APPEARANCES: Alfred G. Hoyl, Rollinsville, Colorado, pro se; Lyle K. Rising, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Denver, Colorado, for the Bureau of Land Management.

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OPINION BY ADMINISTRATIVE JUDGE HUGHES

Alfred G. Hoyl has appealed from the August 21, 1990, decision of the Colorado State Office, Bureau of Land Management (BLM), denying an application for suspension of Federal coal leases C-0127832, C-0127833, and C-0127834. We affirm.

On October 1, 1966, Gerald T. Tresner became the holder of Federal coal prospecting permits C-0127832, C-0127833, and C-0127834. Following an extension of those permits, on September 30, 1970, Tresner filed three preference-right lease applications (PRLA's) for the lands included within the permits. As a condition of receiving preference-right leases, BLM requested Tresner to demonstrate, inter alia, "that coal [was] needed to maintain an existing mining operation * * * or * * * [was] needed as a reserve for production in the near future."

Responding to that request, Coal Fuels-Wilde (a partnership comprised of Alfred G. Hoyl and Donald E. Wilde), acting on Tresner's behalf, submitted an operating agreement between Tresner and Coal Fuels-Wilde. A June 30, 1976, transmittal letter accompanying that operating agreement explained that it "combin[ed] the Tresner Preference Right Lease Applications C-0127832, C-0127833, and C-0127834, with Coal Fuels-Wilde fee lands and Federal Coal Reserve Application C-222778." 1/ According to that letter:

1/ The connection with application C-222778 is not immediately clear from the record, but that application does not appear to have played a part in the present dispute.

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> [T]he Federal leases applied for, together with the fee land, combine to form a Logical Mining Unit [LMU]. The combination of the properties enhances their viability and strengthens their economic potential. * * * The data submitted shows that commercial quantities of coal have been discovered. The planned entry through the fee land proceeding into the Tresner lease application land presents a reasonable prospect of success in developing a valuable mine with revenues adequately exceeding costs.

The operating agreement designated Coal Fuels-Wilde as the manager of the envisioned LMU and named it the "Anchor Tresner Unit."

The fee land owned by Coal Fuels-Wilde was a 150-acre parcel located directly south of and adjacent to the lands covered by PRLA C-0127833. Those lands contained the Fruita No. 1 Mine, an underground coal mine. It appears that the holders of the PRLA's intended to show that the Federal coal covered by the PRLA's was being sought to allow expansion of that mine.

The record indicates that "the Fruita Mine No. 1 is located approximately 15 miles north of Fruita, Mesa County, Colorado, in the 17- to 26-foot thick Cameo coalbed of the Mesaverde Group Mount Garfield Formation" (BLM Report dated Mar. 2, 1983, at 2). According to an investigative report by the Mine Safety and Health Administration (MSHA), U.S. Department of Labor, the mine

> had been developed by driving three entries from the surface through rock under the outcrop burned Cameo coal seam. The

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> rock entries met the dipping coal seam about 900 feet inby the portals. The entries were advanced approximately 75 additional feet to where they were connected by crosscuts and left with a full face of coal.

(MSHA Report dated June 21, 1983, at 3). 2/ Development of the Fruita No. 1 Mine was completed in late 1979 and it was left idle.

According to another MSHA investigative report, prepared in April 1983 and entitled "Investigation of Coal Heating [at] Fruita Mine," there was evidence as early as December 7, 1978, that coal in that mine was burning along the top of the Cameo bed. 3/ That report refers to a map prepared by the mine operator on December 7, 1978, showing up to 12 feet of ash above the coalbed (MSHA Report dated April 1983 at 1). Additionally, it had been necessary to establish unusual ground control. The need for such indicated the presence of heat-deteriorated shales, suggesting that the coal had been burned. Id.

On December 16, 1980, BLM approved two assignments of the PRLA's, effective January 1, 1981. BLM stated that, as a result of these assignments, 100 percent of the record title was held by the Dorchester Coal Company (Dorchester).

2/ As the MSHA report details events well into July 1983, it was obviously written after June 21, 1983, despite its caption.

3/ Although that report concludes that there was an "active heating," it deals with how best to contain the heating and does not offer any opinion on when the presence of the fire should have been detected.

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On June 29, 1981, BLM issued three noncompetitive preference right coal leases, C-0127832, C-0127833, and C-0127834, to Dorchester with an effective date of July 1, 1981. Contrary to the expectations of Hoyl, each lease was issued, by its express terms, as a separate LMU. 4/ Although the regulations provide for the filing of an application to change the multiple LMU status, none was filed. See 43 CFR 3475.6(c).

In mid-1982, Dorchester instituted efforts to control the coal burning in the Cameo bed of the Fruita No. 1 Mine. According to a BLM inspection record dated March 2, 1983, Dorchester considered mining 100 to 150 feet across the lease border into lease C-0127833 to construct a barrier, and other techniques. 5/ Those plans were evidently not carried out. Instead,

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4/ Section 12 of each of the leases provides:

"LOGICAL MINING UNIT (LMU) - This lease is automatically considered to be an LMU. This LMU may be enlarged, adjusted or diminished in accordance with the applicable regulations in Titles 10, 30 and 43 of the Code of Federal Regulations. The mining plan for the LMU shall require that the reserves of the LMU will be mined within a period of 40 years in accordance with 30 CFR 211 and 43 CFR 3400.0-5. The definition of LMU and LMU reserves and other applicable conditions are set forth in the regulations in 43 CFR 3400.0-5 and 3475, 30 CFR 211, and Title 10 of the Code of Federal Regulations."

This lease provision was consistent with 43 CFR 3475.5 (1981).

5/ According to BLM's report,

"Dorchester is considering obtaining approval to mine 100 to 150 feet into Lease C-0127833 to get ahead of the fire and construct a barrier. One idea is to mine a crosscut 20 feet wide, the full height of the coalbed, and extending a minimum distance of 150 feet on each side of the main entries. The barrier would then be filled with water, fly ash, or some other incombustible material. Bulkheads would be used to completely fill the barrier on each side. Between the three entries, the barrier would be filled halfway and bridges would be constructed at the intersections.

"Two other ideas under consideration are to install backfilled tunnel liners through the area of the fire or to seal the entries and drive new rock tunnels from the underlying Anchor bed and intersect the coal beyond the fire."

(BLM Report dated Mar. 2, 1983, at 1).

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it appears that Dorchester pumped water into the coalbed and attempted to cut off air to the fire using a chemical grout (BLM Report dated Mar. 2, 1983, at 1). Those efforts to isolate, control, and extinguish the coal evidently failed, and on June 23, 1983, flames and smoke were being emitted from the return air entry. That more active fire was subsequently controlled and extinguished only by an extensive and concentrated effort, during which entries were flooded and sealed (MSHA Report dated June 21, 1983, at 3-5). There has been no further activity at the mine since then.

Despite the fire, Dorchester continued its plans to develop the Federal leases. On October 11, 1983, Dorchester filed a letter with BLM requesting modification of the two interior boundaries between the three leases. Dorchester indicated that it had been conducting exploration and feasibility studies since 1981 and was initiating the permitting process "for the entire project," that is, for mining the three leases. Significantly, it expressly acknowledged that "[e]ach lease was designated as a separate [LMU] in the terms of the lease as issued" and presented a lengthy explanation of why it felt each lease should be developed as an independent operation. The following quotation from the October 11, 1983, letter is representative:

> We feel the modified boundaries proposed in this submission will result in leases which are considerably more consistent with the definition of a logical mining unit as defined in [43 CFR 3480.0-5(a)(19)]. The changes will allow each lease to be developed in a more "efficient, economical, orderly manner as a unit," as anticipated by the regulation. This proposed modification will improve the development potential of each lease without foreclosing the option of later consolidation of the leases

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into a larger LMU as a result of additional technical and commercial considerations.

By decision dated December 19, 1983, BLM approved the requested modification of the interior boundaries between the three leases. The leases were never consolidated into a larger LMU.

In 1983 and 1984, Dorchester evidently submitted mine permit applications with the Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, as required by the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201-1328 (1988). The record contains little information concerning those applications, but it appears from statements in the record that Dorchester did not actively pursue them and that, after almost 4 years, Dorchester was sold. On November 16, 1987, BLM approved a name change acknowledging that Dorchester had changed its name to American Shield Coal Company (American Shield). 6/

On June 30, 1988, American Shield advised BLM that, "[a]fter careful evaluation of the plans outlined in the pending permit applications for the [three] leases[,] we have determined that the development of the coal resources as proposed is not feasible under current market conditions. By this letter, American Shield * * * hereby withdraws these old mine permit applications."

6/ The record indicates that, on Feb. 7, 1986, the Arabian Shield Development Company purchased all of the outstanding stock of Dorchester and then changed its name to American Shield.

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On January 9, 1989, American Shield filed a request for approval of assignment of the leases back to Hoyl and Wilde. This request was not handled immediately, as BLM had not received performance bonds for the leases as required by the regulations. 7/

On April 6, 1989, Hoyl and Wilde filed an application seeking a 5-year suspension of the leases, citing the mine fire in the Fruita No. 1 Mine. 8/ BLM's denial of that request is the subject of this appeal. They stated in the request that, since issuance, the leases had been extensively drilled, and that three entry mains had been started in the Cameo and Anchor seams. They asserted that over $5 million had been spent on what they described as "the LMU," and that over $400,000 in fees and rentals had been paid to BLM. Hoyl and Wilde described the mine fire, stating that "[e]arly in 1983 entries in the Cameo seam approximately 975 feet from the portal began to heat up, and continuation of entries ceased." Hoyl and Wilde requested the "suspension of rentals, minimum production, continued operation production

7/ After issuing two extensions, on Dec. 22, 1988, BLM issued an order to show cause why American Shield should not be found in default for failure to comply with applicable bonding requirements. This situation remained unresolved at the time of the assignment from American Shield to Hoyl and Wilde. On Sept. 13, 1989, BLM notified Hoyl and Wilde that, as prospective lessees, they would be required to post bonds. Following requests by Hoyl and Wilde, BLM twice extended the time for posting those bonds. On Dec. 20, 1989, acceptable bonds were filed, and on Jan. 11, 1990, BLM approved the assignments.

8/ The application for suspension was filed on letterhead of Coal Fuels Corporation and was not signed by Wilde. By letter dated July 7, 1990, BLM notified Hoyl and Wilde that it required both of their signatures, as prospective holders of record title. BLM also advised that it could not recognize any interest held by Coal Fuels Corporation, which was not a prospective record title holder. In response, on July 12, 1990, Wilde endorsed the application for suspension.

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requirements, commercial quantities production, forty year mine-out requirement, and due diligence requirement."

BLM treated the application as seeking a suspension under the so-called "force majeure" provisions of section 7(b) of the Mineral Leasing Act (MLA) (as amended by section 6 of the Federal Coal Lease Amendments Act (FCLAA)), 30 U.S.C. § 207(b) (1988). Alternatively, BLM treated the application as seeking a suspension in the interest of conservation under section 39 of MLA (as amended by section 14 of FCLAA), 30 U.S.C. § 209 (1988). 9/

On January 11, 1990, following the filing of acceptable performance bonds by Hoyl and Wilde (lessees), BLM approved assignment of the three coal leases to them from American Shield, effective January 1, 1990. 10/ BLM then proceeded to consider the pending application for suspension.

The record contains a March 13, 1990, memorandum from the Grand Junction, Colorado, District Manager, BLM, to the Deputy State Director, Mineral Resources, Colorado State Office, BLM, concerning the mine fire and its relationship to the request for suspension:

> The [lessees'] application for suspension and the record provide only one possible basis for exclusion from the authorization

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9/ The request stated simply that "[t]he type of suspension requested is a Force Majeure suspension and/or conservation, (suspension of operations and production)." No legal authority was cited. It appears that BLM properly interpreted the request as we have described it.

10/ See note 7, supra.

As of BLM's Jan. 11, 1990, decision, an assignment of Wilde's interests in the leases to Hoyl was also pending before BLM.

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> to mine/commencement of mine development criteria, this being the occurrence of the mine fire during the development of fee coal adjacent to the leases. Several facts conspire against the consideration of the fire as a basis for exclusion from the basic regulating criteria. The existence of the problem has been known since 1982. [11/] However costly and regrettable the necessity of having to flood and seal the original entries, the mine plan and permitting pursued by a previous lessee, Dorchester Coal, after the fire had occurred, reveals that it was far from insurmountable as far as restricting lease development. The existing sealed entry locations are only one of many possible entry locations by which the subject lease might be developed. Development of the leases through alternate locations is in line with maximizing extraction of the coal resource and mitigatable in terms of minimizing damage to other resources. The failure on the part of present and previous lessees, to take advantage of the reasonable alternatives in developing these leases can only be construed as an indication that other considerations, outside of what regulations allow for granting a suspension, control the [lessees'] decisions not to develop.

It was recommended that suspensions not be granted.

On May 11, 1990, the Colorado State Office placed in the record an internal memorandum also recommending denial of the application:

> In order for an application for a suspension of operations and production to conform to the ["conservation"] requirements of section 39 [of the MLA] and the regulations, the lessee must have received authorization to mine and onsite mine development must have commenced. No authorization to mine has been obtained for any of the three leases and no mine development has ever occurred on the leases. Permitting and commencement of mine development was limited to 150 acres of fee land adjacent to lease C-0127833 on which operations and production ceased in 1979, three years before the subject leases were issued. No production has occurred on or adjacent to leases C-0127832 or C-0127834. The mine permit applications submitted by Dorchester in 1983 and 1984 for the three leases were never pursued to completion and were formally withdrawn by American Shield by letter dated June 29, 1988.

11/ Additional evidence in the record indicates that the fire was known in December 1978, even before the issuance of the lease.

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> No information is presented by [lessees] to show that a loss of federal coal would occur in the absence of a suspension, or that the sealed portal is the only possible location by which lease C-0127833 might be developed. Analysis by [BLM] mining engineers indicates that the sealed portal site is only one of many possible locations by which C-0127833 might be developed. Development of the leases through alternate portal locations is in line with maximizing extraction of the coal resource and mitigatable in terms of minimizing damage to other resources.

BLM's May 11, 1990, memorandum also concluded that the mine fire was not a force majeure, concluding that it was not unexpected prior to the issuance of the lease, but had been known since 1982. BLM also noted that the fire was not uncontrollable, in that it did not restrict development of the Federal leases, as shown by the fact that Dorchester had submitted a mine plan and mining permit application to develop those leases after the fire occurred. Also, BLM concluded that that plan showed that the spontaneous combustion problem was far from uncontrollable as to restricting lease development.

On May 2, 1990, lessees advised BLM that they would not pay rental while their application for suspension was pending.

At a meeting on June 1, 1990, BLM provided lessees an opportunity to respond to its May 11, 1990, memorandum. They filed documents in support of their application on June 18, 1990. The documents indicated that, in addition to the mine fire, "the difficult market conditions, and the leveraged buyout of Dorchester Gas by Damson Oil delayed the project." These documents did little to refute BLM's recitation of the facts, but stressed instead that the coal in the leases could be commercially developed if an

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extension of time was granted. No allegations of administrative delay were raised.

In a memorandum dated August 20, 1990, BLM pointed out several misconceptions evident in lessees' comments. In particular, BLM noted that lessees did not understand that the granting of a section 39 "conservation" suspension that would suspend the obligation to pay rent and the diligent development period would also suspend their rights to use the lease. Secondly, although the section 7(b) "force majeure" suspension would allow production up to the pre-suspension level, there could be no production here, as the pre-suspension level was zero. Thus, it would not be possible for lessees to continue to develop the lease during any suspension, even if granted. That is, lessees could not use either suspension to gain more time to meet the diligent development period. Further, BLM stated, the force majeure suspension does not suspend the obligation to pay rental, and lessees had already indicated that they believed a suspension would relieve them of that duty.

On August 21, 1990, BLM issued its decision rejecting the application for suspension. BLM rejected the request under section 39 of MLA, holding that such suspension could conform to that provision only if the lessee both previously received authorization to mine and commenced onsite mine development. As no authorization had been obtained (other than for exploratory drilling), and no mine development had occurred on these leases, BLM denied the application.

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BLM also rejected the request for suspension under section 7(b) of MLA, ruling that the mine fire did not meet the definition of "force majeure" because it was neither "unexpected" or "uncontrollable." The existence of the fire, BLM held, had been known since 1982. Further, the mining permit application, which was filed by the then lessee of record Dorchester after the fire occurred, indicated that the spontaneous combustion problem was controllable and would not restrict lease development. Hoyl (appellant) appealed.

[1] Section 7(a) of MLA (as amended by section 6 of FCLAA), 30 U.S.C. § 207(a) (1988), provides in part:

> (a) Term of lease, annual rentals; royalties; readjustment of conditions
>
> A coal lease shall be for a term of twenty years and for so long thereafter as coal is produced annually in commercial quantities from that lease. Any lease which is not producing in commercial quantities at the end of ten years shall be terminated. [Emphasis supplied.]

The leases here were issued effective July 1, 1981. Thus, the deadline for lessees to establish production in commercial quantities from the leases was July 1, 1991. 12/ See also 30 U.S.C. § 207(b) (1988) (requiring "diligent development," that is production of "commercial quantities," defined as 1 percent of recoverable coal reserves, by the end of the "diligent

12/ As BLM acknowledges in its answer, the deadline is not July 1, 1990, as stated in its Aug. 21, 1990, decision.

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development period," July 1, 1991). 13/ It is clear from information submitted by appellant that it would be 4 years after mining began that the production requirement could be met. Thus, it is equally clear that these leases would have been terminated if BLM did not extend the diligent development deadline. 14/

Against this background, it is evident that the purpose of lessees' request for suspension is to gain an extension of the diligent development deadline. Compare Mountain States Resources Corp., 92 IBLA 184, 185, 93 I.D. 239, 240 (1986). That is, what lessees are really after is more time to commence operations and achieve enough production that their leases will not be terminated for failure to meet that deadline. Further, in view of financial difficulties, they desire a rental-free extension of their lease.

[2] We first address the request for suspension under the force majeure provisions. We are not persuaded that the mine fire is properly treated as a basis for relief under section 7(b). First, it occurred on fee land. In order to be regarded as affecting operations on these leases,

13/ "Diligent development" is defined at 43 CFR 3480.0-5(a)(12) to mean "the production of recoverable coal reserves in commercial quantities prior to the end of the diligent development period." For the leases at issue, the diligent development period is the 10-year period commencing July 1, 1981, the effective date of the most recent Federal lease issuance. 43 CFR 3480.0-5(a)(13)(B). "Commercial quantities" is 1 percent of recoverable coal reserves. 43 CFR 3480.0-5(a)(6). The term "recoverable coal reserves" is defined as "the minable reserve base excluding all coal that will be left, such as pillars, fenders, and property barriers." 43 CFR 3480.0-5(a)(32).

14/ For simplicity, we shall refer to the deadline imposed by 30 U.S.C. § 207(a) and (b) (1988) as the "diligent development deadline."

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they would have to have been consolidated in a single LMU along with the fee lands. See 30 U.S.C. § 202a(3) (1988); 43 CFR 3483.3(a)(1). As discussed above, although Hoyl anticipated that consolidation would occur, it never did. In fact, Dorchester expressly confirmed that its technical studies indicated that the leases should be treated as separate LMU's. As they were not included in a single LMU with the Federal lands, any conditions present on the fee lands are not grounds for relief from the terms of the Federal leases.

Second, we agree with BLM that the circumstances of the mine fire did not amount to a force majeure in this case. The language of section 7(b), acknowledging that the continued operation requirement could be suspended if operations under the Federal lease were "interrupted by strikes, the elements, or casualties not attributable to the operator/lessee," is a force majeure provision. In order to invoke a force majeure provision, a lessee must prove that the force majeure event was the proximate cause of his nonperformance; that a good faith effort was made to overcome the problem; and that the problem was beyond his reasonable control. The Rocky Mountain Mineral Law Foundation, 12 American Law of Mining § 131.12[4]. As shown by Dorchester's filing of separate mining plans for the development of each lease after the mine fire, it was not believed that the mine fire would prevent the development of the Federal coal. We are not persuaded that the fire caused the nonperformance. Further, the record strongly suggests that Dorchester failed to take all possible steps to extinguish the fire short of flooding the existing entries.

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The concept of force majeure involves relief from onerous conditions beyond a lessee's control that arise during the term of a lease. The record strongly suggests that Dorchester entered into the Federal leases in 1981 with knowledge that coal was burning in the Fruita No. 1 Mine. We deem it inappropriate to invoke conditions existing at the time of issuance of a Federal lease as force majeure.

[3] It is established that a Federal coal lease may not be suspended under section 7(b) due to adverse market conditions. Mountain States Resources Corp., 92 IBLA at 193, 93 I.D. at 244-45; accord Solicitor's Opinion M-36958, 96 I.D. 15, 29 (1988). Thus, to the extent that lessees' application for suspension was based on economic hardship, the force majeure provision affords no relief.

[4] Even assuming arguendo that the mine fire amounted to a force majeure condition, it could not provide lessees the relief that they seek here, that is, an extension of the diligent development deadline.

First, we have held that the language of FCLAA, its legislative history, and the Department's regulations all foreclose a suspension of the deadline for meeting the diligent development requirement, where such suspension is based on force majeure conditions. Mountain States Resources Corp., 92 IBLA at 189-91, 93 I.D. at 242-44. Under section 7(b) of MLA, each coal lease is subject to two conditions, diligent development and continued operation. The requirement for continued operation may be suspended "where operations under the lease are interrupted by strikes, the elements,

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or casualties not attributable to the lessee," that is, by force majeure conditions. The requirement for diligent development, however, may not be suspended by the existence of force majeure conditions under section 7(b): "Nothing in this subsection shall be construed to affect the requirement contained in the second sentence of subsection (a) of this section relating to the commencement of production at the end of ten years." 30 U.S.C. § 207(b) (1988). 15/

[5] Second, the only relief available under section 7(b) where force majeure conditions exist is from the lease requirement that "continued operation" be maintained. That term is a precisely defined term of art:

> Continued operation means the production of not less than commercial quantities of recoverable coal reserves in each of the first 2 continued operation years following the achievement of diligent development and average amount of not less than commercial quantities of recoverable coal

15/ As discussed in more detail in Mountain States Resources Corp., 92 IBLA at 189-90, 93 I.D. at 242-43, the purpose of enacting this condition was to prevent the holding of Federal coal interests for long periods of time for speculative purposes without development.

We are aware that, in December 1988, the Department amended its regulations to provide that, if a suspension were granted under section 39 of MLA in the interest of conservation, the deadline for establishing diligent development would be extended. 43 CFR 3483.3(b)(1) (53 FR 49985 (Dec. 13, 1988). This question is considered below. However, the Preamble to that rulemaking makes it clear that the rulemaking did not affect suspensions issued under section 7(b) of MLA in recognition of force majeure conditions: "[A] second area of concern related to whether the effects on the 10-year diligent development period for a force majeure suspension pursuant to section 7(b) of MLA and a suspension of operations and production pursuant to section 39 of MLA are identical. Force majeure suspensions are not the subject of this final rulemaking. However, this question will be considered during the review of the 43 CFR Group 3400 regulations."

We are not aware that that review has been completed.

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reserves per continued operation year thereafter * * *. [Emphasis supplied.]

43 CFR 3480.0-5(a)(8). It follows that, in order for there to be "continued operation," there must first be "diligent development." 43 CFR 3483.1(a)(2); Mountain States Resources Corp., 92 IBLA at 193, 93 I.D. at 244. That is, in order to receive relief, lessees would have had to show timely production of at least 1 percent of the recoverable coal reserves on each lease. 16/ Not only have lessees not achieved diligent development, they have not commenced operations on any of the three Federal leaseholds. No relief is available to them under the force majeure provision.

BLM properly declined to grant a suspension under section 7(b) of MLA.

It remains to determine whether BLM also properly denied lessees' requests under section 39 of MLA (as amended by section 14 of FCLAA), which provides:

16/ As noted below, each lease was a separate LMU, so that a separate diligent development requirement applied to each lease. Even if the three leases and the fee lands could be treated as a single LMU, the record indicates that, at most, only 30,000 tons were produced from the fee lands (Coal Fuel Corporation's Notes on June 1, 1990, meeting with H. Robert Moore at 1). BLM filed information indicating that production was much less (BLM Answer, Exh. 1 at 2). Even if all of the production cited by appellant occurred after issuance of the Federal leases, it fell vastly short of 1 percent, the required amount to achieve diligent development of such single LMU, as the record discloses that the recoverable coal reserves on the three Federal leases and fee lands is 150 million tons (BLM July 18, 1980, Environmental Assessment at 2-9).

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> The Secretary of the Interior, for the purpose of encouraging the greatest ultimate recovery of coal, * * * and in the interest of conservation of natural resources, is authorized to waive, suspend, or reduce the rental * * * on an entire leasehold, or on any tract or portion thereof segregated for royalty purposes, whenever in his judgment it is necessary to do so in order to promote development, or whenever in his judgment the leases cannot be successfully operated under the terms provided therein. * * * In the event the Secretary of the Interior, in the interest of conservation, shall direct or assent to the suspension of operations and production under any lease granted under the terms of this chapter, any payment of acreage rental * * * prescribed by such lease likewise shall be suspended during such period of suspension of operations and production; and the term of such lease shall be extended by adding any such suspension period thereto.

30 U.S.C. § 209 (1988).

Two distinct forms of relief are authorized by that provision: (1) waiver, suspension, or reduction of lease rental, which is authorized for the purpose of encouraging the greatest ultimate recovery of coal, and in the interest of conservation of natural resources; and (2) suspension of operations and production (which includes a suspension of rental and extension of the lease term), which is authorized in the interest of conservation. Accord Solicitor's Opinion M-36958, supra at 20. Lessees have requested both suspension and waiver of rental, and we shall consider each request separately.

[6] Unlike section 7(b), section 39 does not state that a suspension issued under its authority will not extend the diligent development deadline. Under 43 CFR 3483.3(b), which implements section 39, BLM is authorized,

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> in the interest of conservation, * * * to act on applications for suspension of operations and production, * * * direct suspension of operations and production, and terminate such suspension which have been or may be granted. Applications by an operator/lessee for relief from any operations and production requirements of a Federal lease shall contain justification for the suspension.

As provided in 43 CFR 3483.3(b)(1), such suspension

> suspends all other terms and conditions of the Federal coal lease or LMU, for the entire period of such a suspension. Rental and royalty payments will be suspended during the period of such suspension of all operations and production, beginning with the first day of the Federal lease month in which operations or production becomes effective.

Finally, under 43 CFR 3483.3(b)(3), the "term, including the diligent development period, of any Federal lease shall be extended by adding to it any period of suspension in accordance with paragraph (b) of this section, of operations and production." (Emphasis supplied.) See Consolidation Coal Co., 111 IBLA 381, 390 (1989); Solicitor's Opinion, M-36958, supra at 30. Thus, if a lessee is entitled to a section 39 suspension, he may successfully avert the cancellation of his lease for failure to meet the diligent development requirement of section 7(a) and (b).

[7] The Department has promulgated no regulations setting out guidelines for determining when granting a section 39 suspension is appropriate. We have construed section 39 in the context of Federal oil and gas leases to provide for suspension either (1) as a matter of right where, through some act, omission, or delay by a Federal agency, beneficial enjoyment of a lease has been precluded, or (2) as a matter of discretion, in the interest

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of conservation, that is, to prevent damage to the environment. Bronco Oil & Gas Co., 105 IBLA 84, 87 (1988); NevDak Oil & Exploration, Inc., 104 IBLA 133, 137-38 (1988) (applying Sierra Club (On Judicial Remand), 80 IBLA 251 (1984), aff'd sub nom. Getty Oil Co. v. Clark, 614 F. Supp. 904 (D. Wyo. 1985), aff'd, Texaco Producing, Inc. v. Hodel, 840 F.2d 776 (10th Cir. 1988); and Copper Valley Machine Works v. Andrus, 653 F.2d 595 (D.C. Cir. 1981)); see also Stephen G. Moore, 111 IBLA 326, 329 (1989); and John March, 98 IBLA 143, 147 (1987). In other words, a suspension of the lease term in the interest of conservation is required where delays imposed upon the lessee due to administrative actions addressing environmental concerns have the effect of denying the lessee's operator "timely access" to the property (Getty Oil Co. v. Clark, supra at 911) 17/ and may be granted where activity must be suspended on a lease to prevent environmental damage (Copper Valley Machine Works v. Andrus, supra at 600). 18/

None of those circumstances has been demonstrated in the present case. There is no evidence of undue delay imposed by administrative actions

17/ For example, where coal mining operations on a primary lease were precluded until the preparation of an environmental impact statement addressing the environmental consequences of mining both the leased land and an adjacent tract being considered for a preference-right lease, BLM properly granted a section 39 suspension. Consolidation Coal Co., supra at 383.

18/ As discussed above, no operations have commenced here. It was stressed in the preamble to the 1988 rulemaking amending 43 CFR 3483.3(b)(1) that suspensions would generally be warranted only "where operations have commenced and production has occurred." Nevertheless, the preamble admitted of the possibility that there might be situations where a lease would qualify for a suspension of operations even though operations have not commenced. The circumstances considered by the courts in Copper Valley and Getty were cited. 53 FR 49985.

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addressing environmental concerns. It appears that separate applications for leave to mine the leases were timely filed and considered, but that the development plans were abandoned by Dorchester, the then lessee of record. Although there was evidently insufficient time left when appellant once again became the lessee of record to meet the diligent development deadline, we see nothing that could place the blame for those circumstances on BLM or any other administrative agency. In these circumstances, a request for suspension is properly denied. See NevDak Oil & Exploration, Inc., supra at 137-38.

Appellant relies on the fact that a substantial investment has been made in bringing these leases to their current state of development. He also asserts that development of the leases individually will result in unnecessary environmental damage, such as from construction of other roads to the three sites, and that "[c]onsiderable loss of federal coal would occur if the present entries were ignored and the opportunity of gaining the knowledge to ensure that spontaneous combustion could be controlled and eliminated were lost." He alleges that environmental harm will occur if the leases are not suspended so that they can be developed together.

We note that a suspension of the lease under section 39 for conservation purposes terminates immediately upon commencement of operations on the lease. See Ruby Drilling Co., 119 IBLA 210, 214 (1991). Thus, even if a suspension could have been granted in April 1989, appellant would still not have had adequate time prior to the July 1991 deadline to meet the diligent

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development requirement, as his suspension would have terminated as soon as he began his attempt to achieve production.

Further, appellant continues his presumption that the three leases and the fee lands are a single LMU. As discussed above, they are not. In order to prevail, appellant must show that suspension of each lease would be in the interest of conservation. He has failed to do so.

In any event, appellant has not proven his allegation that the Fruita No. 1 Mine entries must be used in order to avoid or control spontaneous combustion in the coal on the Federal leases. Further, in view of the inoperative state of the Fruita No. 1 Mine and the likely environmental cost of reopening that mine following the fire and flooding of the entries, appellant's assertions that developing new mines would be more environmentally damaging than using that mine are highly speculative and fail to convince us that his proposal is in the interest of conservation.

We are not unmindful that a substantial investment of funds in the three Federal leases was made. However, we do not regard that fact as creating any cognizable equitable or legal right to retain the leases indefinitely, especially in view of Congress' evident policy of requiring development by directing that leases that are not actually developed be terminated. See Mountain States Resources Corp., 92 IBLA at 189-90, 93 I.D. at 242-43.

BLM properly denied lessees' request for suspension here.

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[8] Appellant has also requested that lessees' obligation to pay rental be suspended. Such relief is available under section 39, as interpreted by Department regulations. 43 CFR 3485.2(c)(1); Mountain States Resources Corp., 92 IBLA at 193-95, 93 I.D. at 244-45. However, Departmental regulation 43 CFR 3485.2(c)(2) requires detailed information that must be presented to support such an application, including (among other things) facts indicating whether the mine can be successfully operated under the existing lease terms. The request for suspension filed by lessees did not comply, and it was therefore properly rejected. Id.; see Sheridan-Wyoming Coal Co., A-25845 (June 27, 1950).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

David L. Hughes
Administrative Judge

I concur:

John H. Kelly
Administrative Judge

IBLA 91-88	:	C-012782 through C-0127834
	:	
ALFRED G. HOYL	:	Denial of Application for
	:	Suspension of Coal Leases
(123 IBLA 169, 99 I.D. 87 (1992))	:	
	:	MMS-90-0328-MIN and
IBLA 91-392, 92-410	:	MMS-91-0162-MIN
	:	
ALFRED G. HOYL	:	Order to Pay Past-Due Rentals
(ORDER OF JUNE 3, 1992)	:	
	:	Petition for Reconsideration
	:	Granted
	:	
	:	Decision and Order Reaffirmed As
	:	Modified

ORDER

Alfred G. Hoyl, by and through counsel, has filed a timely petition for reconsideration of our decision, issued on June 3, 1992, affirming the denial of his application for suspension of Federal coal leases by the Colorado State Office, Bureau of Land Management (BLM). Alfred G. Hoyl, 123 IBLA 169, 99 I.D. 87 (1992). Additionally, Hoyl has timely petitioned for reconsideration of our order, also issued on June 3, 1992, affirming two decision by the Director, Minerals Management Service (MMS), directing Hoyl and Donald E. Wilde to pay past-due rentals on those leases. Alfred G. Hoyl, IBLA 91-392 and IBLA 92-410 (Order affirming MMS decision, June 3, 1992). We grant Hoyl's petition for the purpose of responding to points raised therein, but reaffirming our decision and order as modified below. 1/

1/ BLM has taken several additional adverse actions against these leases since its Aug. 21, 1990, decision denying the request for suspension. Those actions area not under review in this appeal.

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Hoyl's petition, filed in three separate pleadings, notes that Hoyl did not have legal counsel before the Board and asserts generally that "[u]nsupported assumptions of fact appear to have been relied upon in BLM and Board-decision-making," and that "BLM appears to have induced Hoyl to incur substantial obligations on the quantities of coal from his federal leases, then denied him that opportunity" (Petition at 2). Hoyl stresses that he has not held these leases for speculative purposes; that he has planned a "large-scale, underground mine" for those leases, along with certain privately-owned lands, since 1976; that several of the main entries to the mine have already been construed; and that BLM and this Board have ignored these facts. He summarizes his position as follows:

> Government delays in lease issuance, an unexpected mine fire, BLM erroneous or misleading advice regarding suspensions, change of BLM position during processing of Hoyl's application, miscommunication and misunderstanding have combined with changing law and policy, weak coal markets, and defaulting operators to deny Hoyl the opportunity to mine this coal reserve. Holy has expended substantial personal efforts and funds to develop this mine over the past 22 years; all would be lost if the Board does not reconsider Hoyl's appeal of BLM's decision.

Id.

Suspension to Avoid Loss of Mineral Resources on the Leases

Hoyl asserts on reconsideration that he is entitled to a suspension under section 39 of the Mineral Leasing Act (MLA), 30 U.S.C. § 209 (1988),

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to avoid loss of mineral resources on the leases. 2/ BLM has discretions to grant a suspension "in the interest of conversation" under section 39 of the MLA "for purpose of encouraging the greatest ultimate recovery of coal." 30 U.S.C. § 209 (1988). The term "conservation" includes maximizing recovery and avoiding or minimizing waste or loss of the lease mineral resource. Solicitor's Opinion, M-36958, 96 I.D. 15, 29 (1988). Thus, it is appropriate to issue a suspension where mineral resources would be lost if a suspension were not granted. Hoyl points out that, by decision dated December 6, 1990, BLM granted an extension of lease C-079641, held by Trapper Mining, Inc. (Trapper), for that reason. He argues that his request for suspension should also have been granted.

It is appropriate to review the circumstances in the Trapper case so that they can be compared to the present case. Trapper stated as follows in its application:

> Trapper is the operator of the Trapper Mine located about six miles southwest of Craig, Colorado. The Lease [(C-079641)] is one of five federal coal leases, two state coal leases and four private and county coal leases comprising more than

2/ That issue was not discussed in our initial decision. As explained therein, BLM had stated the position that a section 39 suspension would not ordinarily be warranted where operators had not commenced, but had also observed that a lease might qualify for a suspension even though no operations had commenced, as held in Getty Oil Co. v. Clark, 614 F. Supp. 904 (D. Wyo. 1985), aff'd, Texaco Producing, Inc. v. Hodel, 840 F.2d 776 (10th Cir. 1988). See Preamble to Rulemaking 53 FR 49984-85 (Dec. 13, 1988). Thus, in view of the absence of production on Hoyl's leases, the availability of a section 39 suspension seemed to turn on whether administrative actions addressing environmental concerns had denied lessees' "timely access" to the property (Getty Oil Co. v. Clark, supra at 911), rather than whether there was possible loss of the mineral resources leased.

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> 10,000 acres which make up the Mine. The current plan for mining those reserves was prepared in the early 1970's, and was approved by the U.S. Geological Survey in 1976, to meet delivery requirements over the life of the Craig Station Fuel Agreement ("CSFA"), which was signed on March 1, 1973. The Plan has been updated periodically since 1976, in accordance with law and as new data becomes available, to meet the requirements of the CSFA in an orderly, economic and efficient manner, taking into account all of the coal resources within all of the leases. Mining began in 1977 and deliveries to the adjacent Craig Station Power Plant commenced in 1987. The Mine has operated continuously since that time, and the CSFA calls for continued deliveries through 2014. The Mine was originally developed and operated by Utah International, Inc., and Trapper became the operator in 1983. Current production under the CSFA is approximately 2.1 million tons per year.
>
> Trapper operates the Mine under Permit No. C-81-010, which was renewed by the Colorado Mined Land Reclamation Division as of December 31, 1987. The Division is the regulatory authority for federal coal operations in Colorado under a state program and cooperative agreement approved by the U.S. Office of Surface Mining. The permit area boundary approved in the Permit includes all areas to be mined over the life of the Mine. The Lease is included at the extreme eastern boundary of the permit area. The Permit, which reflects an earlier version of the long range mine plan, projects that mining will commence on the Lease in 1993. But, current mine planning indicates that commencement in about the year 2000 is more realistic. [Emphasis supplied.]

It is evident that Trapper was actively pursuing an approved mining plan calling for the orderly removal of coal from the various leases covered by the plan, both Federal and non-Federal. The coal on Federal lease C-079641 is the last scheduled to be mined under the plan. That plan fell several years behind schedule, so that it was evident prior to the filing of the request for suspension that operations could not be commenced before the due diligence for that lease.

BLM granted a suspension of operations and production on Trapper's lease under section 39 "[i]n order to ensure Maximum Economic Recovery [MER]

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and in the interest of conservation of the lease mineral resource and other natural resources on and adjacent to the lease":

> Trapper has a well-designed, approved mine plan which will maximize economic coal recovery over the entire mine property and has made a substantial investment in the form of a long term contract with the Craig Station Power Plant, permitting, and equipment [sic.]. The diligent development due date for lease extract the coal in an orderly progression across several federal leases and fee and state lands. The lease is not scheduled to begin production until shortly after the year 2000. A Logical Mining Unit is not a feasible alternative. Because of its locations and higher stripping ratios, it is unlikely that the lease could be mined as a separate operation in the future. A suspension of operations and production would allow extraction of all of Trapper's surface reserves in an orderly sequence before the underground reserves are mined. [Emphasis supplied.]

(BLM Decision Granting Suspension, Dec. 6, 1990).

Trapper's situation involves an ongoing operation where an approved mine plan is presently being followed and where a market for coal produced from the leases has long been established. BLM was satisfied that, if that plan was allowed to proceed, the coal in lease C-079641 would be mined eventually, but could not be mined as originally scheduled. BLM was also satisfied that the coal covered by that lease might never be mined if additional time were not granted to allow the mine plan to run its course, evidently because the coal might have been bypassed. Thus, BLM was convinced that the coal would be lost if not held under lease to Trapper. Also, BLM could be reasonably assured that extending the lease would result in the mining of the coal, as Trapper had proven itself to be a bona fide

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developer of the resource, with an outgoing operation and established market for the coal.

By contrast, in Hoyl's case, nothing shows that the coal included in the leases would have been lost if a suspension were not allowed. To the contrary, the potential for developing the coal reserves here has not been adversely affected, since no mining has ever occurred on the leased lands. The lands are in the same condition that they were when the leases were issued, and the record shows that the lands can still be mined, even if Hoyl's leases are cancelled. There is no indication that, even if the suspension were granted, the coal would be mined, as Hoyl and his predecessors in interest neither commenced operations or developed a market for the coal.

Hoyl stresses that he has previously mined three entries of fee lands directly accessing the coal included in the leases at a cost of $7 million, asserting that investment places him in a better position to mine the coal than a person receiving a new lease. The question here is not whether Hoyl could develop the leased lands more economically than a new lease, but whether coal resources would be lost if they did not remain under lease to him and the lease were not suspended. Nothing in the record shows that the availability of Hoyl's three flooded entries would be a controlling factor in whether the coal could be developed. In sum, we reject as unproven Hoyl's argument on reconsideration that "Federal coal would be lost or bypassed if some new mine operator paid a substantial bid to acquire new leases, made capital expenditures duplicating work

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done from Hoyl's fee leases, and high grading or production interruption would inevitably result, if production ever was achieved at all" (Petition at 7). 3/

Suspension Due to Preclusion of Beneficial Use of the Leases

Hoyl argues that he is entitled to a suspension under section 39 of the MLA due to preclusion of beneficial use of the leases. A section 39 suspension tolls the running of the lease term, so that such suspension, if granted, has the effect of extending the term of the lease by the period of the suspension. 43 CFR 3483.3(b)(3). The extension covers the period that the lessee was denied beneficial use of his lease by the Department. Solicitor's Opinion, M-36953, 92 I.D. 293, 297 (1985); accord, Paul C. Kohlman, 111 IBLA 107, 111 (1989). "Beneficial use" refers to all operations under the lease except for those necessary to maintain or preserve the mine workings, to conduct reclamation work, or to protect the leased lands, natural resources, or public health and safety. 4/ Solictor's

3/ Along these lines, we note that we do not agree with Hoyl (Petition at 4) that the record shows that maximum economic recovery (MER) would be achieved by following this proposal to mine the Federal leases and fee lands as a unit. The single mine plan was the basis on which BLM concluded that the leases should issue. However, BLM's approval of the leases in 1981 amounted to no more than a finding that that plan had a reasonable prospect of economic success and was not prima facie environmentally unsound. Additional review would have been needed before a resource management and production plan (R2P2) for a single mine could have been approved. That review never occurred, because Dorchester Coal Company (Dorchester) abandoned the single-unit concept in favor of a plan to develop each lease separately.

4/ Although we used the term "beneficial enjoyment" in our initial decision, we intended no distinction with the term "beneficial use."

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Opinion, M-36958, 96 I.D. 15, 20 n. 9 (1988); accord, Paul C. Kohlman, supra at 111 n.3.

There are two judicially-recognized situations where a suspension may be granted under section 39 due to preclusion of beneficial use of a lease. We shall consider both situations.

Preclusion Due to Government Order Suspending Operations to Protect the Environment

Where the Government suspends operations and production on a lease issued under the MLA in order to protect the environment, the lease is entitled to an automatic extension for the period of the suspension as a matter of right. Copper Valley Machine Works v. Andrus, 653 F.2d 596 (D.C. Cir. 1981); Alfred G. Hoyl, 123 IBLA at 190-91, 99 I.D. at 98. 5/ In Copper Valley, an oil and gas lessee applied for and received a permit to conduct drilling on lands in Alaska. The permit contained a stipulation forbidding drilling operations during summer months, in order to prevent damage to tundra/permfrost surface values of the lands. That stipulation took away the right to drill (a fundamental of the beneficial use of the oil and gas lease) and was therefore held by the Court to be a Government-imposed suspension of operations and production.

5/ To the extent that our initial decision stated that suspension imposed by the Government to prevent damage to the environment is "a matter of discretion" and "may be granted where activity must be suspended on a lease to prevent environmental damage" (Alfred G. Hoyl, 123 IBLA at 190-91, 99 I.D. at 98-99), it is hereby modified.

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There was no Government-imposed suspension of operations and productions here. The record demonstrates that Dorchester was allowed to, and did, conduct exploratory drilling for 3 years on this lease. 6/ At the end of that time, an R2P2 approved by BLM was required (43 CFR 3482.1(b) (1983)), as well as a mine plan approved by OSM. See Section 11 of Leases. Although applications for such were filed, Dorchester and its successor American Shield failed to pursue those applications to completion and therefore never earned the right to mine. 7/ Thus, it cannot be said that the Government ever suspended the right to mine to protect the environment, and no extension of the lease terms for that reason was required here to compensate for such action.

Preclusion Due to Delays for Administrative Actions Addressing Environmental Concerns

It remains to determine whether delays imposed upon the lessee due to administrative actions addressing environmental concerns had the effect of denying "timely access" to the property, as in Getty Oil Co. v. Clark, supra. 8/ The question is whether such administrative delay "constituted

6/ Dorchester received approval to explore the leaseholds by drilling, to evaluate coal reserves for its mine plan. From September 1981 through October 1982, some 57 holes were drilled. The exploration was apparently completed by August 1983, when an exploration inspections was done.

7/ As discussed below, the fact that applications were not granted is attributable principally to failure to pursue those applications, rather than to undue Government delay.

8/ In that case, concerning an oil and gas lease, 8 months prior to the deadline to establish drilling, the lessee filed an application for permit to drill (APD) an oil and gas well. The Department determined that an environmental impact statement (EIS) would be necessary to consider

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a de facto suspension mandating an extension of the lease term"; if so, denial of the suspension requested by the lessee under section 39 could constitute an abuse of discretion. See Getty Oil Co. v. Clark, supra at 917. 9/

On reconsideration, Hoyl specifically asserts that he was harmed by BLM's delay in issuing the leases (Petition at 5, 8). Although a very long period passed between the filing of the application for leases and the date of issuance 10/, no harm resulted from that delay. The diligent development deadline is set by statute at 10 years from the date of lease issuance. 30 U.S.C. § 207(a) (1988). Any delay in issuing the leases had no effect on that deadline because the lessee was granted the full term allowed by law to accomplish diligent development. Hoyl stresses that, by the time BLM issued the leases, economic conditions had changed and were no longer favorable for developing coal resources. Even if it is clear in hindsight that Hoyl would have been better of if the leases were issued earlier,

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fn. 8 (continued)
the environmental effects of the drilling. Review of the APD could not be completed prior to the expirations of the lease. The lessee, faced with termination of its lease for failure to drill, filed a request for suspension of the lease under section 39 of the MLA. A suspension was granted retroactive to the first day of the month that lessee commenced the required application procedure.

9/ Thus, it is not strictly true, as we stated in Hoyl, supra, that the lessee is entitled to a suspension as a matter of right where, through some act, omission, or delay by a Federal agency, beneficial enjoyment of a lease has been precluded. Nevertheless, the Court in Getty suggested that a suspension of the lease term in the interest of conversation is required where delays imposed upon the lessee due to administrative actions addressing environmental concerns have the effect of denying the lessee's operator "timely access" to the property, as it would be an abuse of discretions not to grant a suspension in such circumstances. Getty Oil Co. v. Clark, supra at 917.

10/ The applications for preference-right leases were filed on Sept. 30, 1970, but were not granted until July 1, 1981.

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BLM cannot be faulted for any deterioration of economic conditions affecting coal mining.

Hoyl also points out to delay in handling Dorchester's R2P2 application and its application for permit to mine. The record demonstrates that there was some administrative delay resulting from consideration of the environmental effects of Forechester's proposed R2P2, including a demand by OSM that Dorchester present additional information for use in an EIS. Hoyl now seeks to capitalize on that delay by requesting an extension of the term of his lease. We reject this attempt for several reasons.

First, the R2P2 application that was subject to delay for environmental review is no longer pending. American Shield expressly withdrew that plan in 1988. Although BLM may properly grant a suspension retroactively (see 43 CFR 3483.3(b)(1)), we do not fault it for declining to do so here. We hold that, once an R2P2 application is withdrawn, the lessee or its successor loses its right to seek a suspension of the lease terms on account of any delay associated with environmental review of that plan. To hold otherwise would be to allow a lessee to extend its lease indefinitely by filing, and then withdrawing, a series of proposals requiring environmental review. That would render ineffective the stringent development requirements imposed by Congress in section 6 of the Federal Coal Lease Amendments (FCLAA), 30 U.S.C. § 207(b) (1988).

Second, no economic market for the coal in these leases has ever been demonstrated. In amending the regulations to provide that the

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due diligence requirement could be extended by a period of time equal to the duration of a section 39 suspension of operations and production, the Department stressed that the intent of Congress in FCLAA to discourage speculation in non-producing Federal coal leases "cannot be circumvented by allowing across-the-board suspension for lessees that cannot find an economic market." (Emphasis supplied.) See Preamble to Rulemaking 53 FR 49985 (Dec. 13, 1988). Stated another way, adverse economic or market conditions are not included within the term "in the interest of conversation" under section 39, and therefore do not by themselves create grounds for approval of a suspension under that section. Id.; compare Mountain States Resources Corp., 92 IBLA 184, 193, 93 I.D. 239, 244-45 (1986) (holding that a Federal coal lease may not be suspended under section 7(b) of the MLA due to adverse market conditions). We fully agree with that interpretation. 11/

The record strongly suggests that, from its inception, the failure to develop this lease has been the result of a failure to find a market

11/ We are aware that BLM has granted suspension under section 39 for oil and gas leases containing "stripper wells," citing adverse economic conditions. See, e.g., Samuel Gary Jr. & Associates, Inc., 125 IBLA 223, 224-25 (1993). A stripper well is an oil and gas well that has been completed and is producing at a small rate, so that its income barely exceeds the operating costs of production. A Dictionary of Mining, Mineral, and Related Terms at 1090. The reason a suspension is granted for such a lease is that the mineral resource will be lost if the well is plugged and abandoned because it cannot be economically operated due to the low price of oil or gas. It is sure that the mineral resource will be lost, as no one will redrill the lands in the future in the face of the evidence of marginal productivity. In those circumstances, preserving the well until the price of oil or gas rises would prevent irretrievable loss of the leased resources.

As discussed above, we are not persuaded that coal will be irretrievably lost if no suspension is granted to Hoyl.

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for the coal. 12/ Although absence of market is not, by itself, controlling, it is one factor that BLM may use in deciding whether to exercise its discretion to grant a section 39 suspension.

Finally, it must be noted that the failure to develop these leases resulted not from Governmental delay, but from the affirmative choice of the lessee of record not to proceed. 13/ It is clear that those delays,

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12/ For example, in December 1983, Dorchester submitted its application to Colorado Stated Mined Land Reclamation Division (CMLRD) to trigger joint State and Federal review of a large scale project to mine the leases, including an application for R2P2 for BLM's review, and an application or a mine permit for review by the Office of Surface Mining Reclamation and Enforcement (OSM). On page 17 of the Executive Summary filed with that application, Dorchester expressly recognized the present lack of market for coal, stating that the "present mine bench and portal facilities accessing the Anchor seam will be maintained in a manner to facilities reopening should a market develop."

13/ Dorchester filed three applications seeking various Government permits, one for each individual lease, from December 1983 through June 1984. Those applications were deemed incomplete, and additional data was promptly demanded as several points in the next several months. However, responses to OSM's findings of inadequacy made in March, June, and October 1984 were not filed by Dorchester until July 1985. It thus appears that much of the delay was due to Dorchester's failure to respond timely.

In April 1986, American Shield's summed up the history of the leases to that point, noting the reasons for the substantial delay in complying with Government requests for additional information:

"As you may recall, the Fruita permit review is overseen and coordinated through the Colorado Joint Review Process (CJRP) * * *. Under a schedule developed in the CJRP, the Fruita permit applications were submitted in a sequential fashion in late 1983 and early 1984, and subsequently deemed to be complete by the [CMLRD]. * * * The permit review process was slowed as Dorchester prepared responses to the [CMLRD] letters. The resultant delay was a function of two independent considerations. The acquisitions of additional environmental baseline information required for the adequacy response was seasonally dependent. Further, a corporate buy out of Dorchester's parent company by Damson Oil and subsequent staff reductions impaired Dorchester's ability to quickly respond to the deficiencies.* * * In view of the pending sale of the properties, your staff was advised to temporarily defer their review of that information" (American Shield letter to OSM, Apr. 18, 1986).

American Shield subsequently determined not to pursue those applications.

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more than any administrative delay, wasted much of the time allowed by law to achieve diligent development.

Hoyl attempts to equate his situation with that of Consolidation Coal Company (Consol), which (as we noted in our initial decision) did receive a suspension under section 39 from BLM in 1986. See Alfred G. Hoyl, 123 IBLA at 191 n.17, 99 I.D. at 98 n.17, citing Consolidation Coal Co., 111 IBLA 381, 383 (1989). Hoyl has submitted documentation on reconsideration showing the details of that suspension.

Consol owns a Federal coal lease (the Meeker lease) and a parcel covered by a prospecting permit (the James Creek parcel). It filed a preference right lease application for that parcel (the James Creek PRLA) indicating that, if its PRLA were granted, it would develop the two parcels together as a single surface mine. 14/ In view of substantial environmental questions surrounding granting the James Creek PRLA and the proposed surface mine, BLM decided to prepare an EIS. In the meantime, the 10-year development deadline for the Meeker lease was approaching. Consol applied for a suspension of the terms of that lease, asserting that it could not mine the Meeker lease separately from the James Creek parcel without losing a substantial amount of coal. As Hoyl stresses on reconsideration, BLM suspended the Meeker lease even though no operations had been established on it and no market had been established for the coal.

14/ Consol's PRLA application proposing surface mining on both tracts was an amendment to its original PRLA, which had proposed only development of lands within the PRLA.

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Hoyl's situation is fundamentally different from Consol's. First, Consol possessed interests in two adjacent tracts that would ripen into lease rights at widely disparate times, thus creating different development deadlines. 15/ Those leases covered coal lands that could most effectively be exploited as a single unit, so that it was "in the interest of conservation" for BLM to bring the two interests into step by establishing a single deadline for development. Second, at the time to develop the Meeker lease was being delayed by BLM's consideration of the James Creek PRLA. Thus, as of the date the request was filed and for some time previously, Consol's right of timely access to the Meeker lease was being delayed by BLM's preparation of an EIS. That delay, coupled with the fact that forcing Consol to mine the Meeker separately would waste resources, properly brought Consol within the protection of section 39.

In contrast, Hoyl's leases were issued at the same time and thus do not prevent an unworkable deadline. Further, when Hoyl filed his request for suspension, no administrative action was pending before BLM, OSM, or CMLRD that was delaying his right to develop the leases. Finally, as we have held above, unlike in Consol's case, nothing indicates that coal resources would be lost it a suspension were not granted to Hoyl.

15/ The Meeker lease (C-093713) was issued by BLM on June 1, 1967. The James Creek prospecting permit was issued by BLM at roughly the same time, on Sept. 1, 1966. However, no preference right lease had ever been issued for the James Creek parcel.

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As to the significance of the existence of a market for the coal and the initiation of production, we note that the purposed behind BLM's policy to require that operations be commenced and a market established is to ensure the granting of a suspension assists development of the lease and to avoid retention of the lease for speculative purposes. In deciding whether a suspension is sought in good faith as part of an effort to develop the lease, BLM must take into account many factors. Although the contemporary presence of a market for the coal and initiation of development on the leasehold are strong indicia of good faith, they are not the only factors showing that the suspension is in aid of development. Other factors would include the past actions of the lessee and the likelihood that the proposed development plan could actually succeed.

It is not possible to tell whether BLM had an adequate basis to conclude that Consol's lease would eventually be developed. However, we can state that BLM's decision not to grant a suspension to Hoyl was within its discretion. The absence of a proven market and lease operations showed that it was unlikely that the lease would be developed if the suspension were granted, a circumstances plainly violative of the develop-or-lose dictate of FCLAA.

Hoyl also condemns BLM for delaying action on his application for suspension (Petition at 9). Hoyl filed that request on April 3, 1989, along with a request for approval of an assignment of record title from American Shield, which was then lessee of record, to him and Wilde. BLM did not approve the assignment until January 1, 1990, at which time it considered

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his application for suspension. Hoyl asserts that, by first considering the request for approval of assignment, BLM improperly "switched the order" of its consideration of his requests, thus delaying its consideration of the critical request for suspension.

Hoyl was not a record title holder or operator for these leases in April 1989 and, therefore, lacked authority to apply for relief from production requirements. See 43 CFR 3483.4(b). Thus, BLM handled the requests in the proper order, as it would not consider his request for suspension until it decided whether record title could properly be transferred. BLM's delay in considering the assignment was necessary to review the assignment agreement, determine the appropriate bond amounts, solicit the opinion of the Anti-Trust Division of the U.S. Department of Justice, and review whether the estate of Gerald T. Tresnar (the original holder of the preference right lease application interest) retained any interest in the leases. BLM's approval of the assignment was delayed because Hoyl needed additional time to submit performance bonds as prospective lessee of record. Nor did BLM unduly delay considering the request for suspension, once record title passed, as it was necessary for BLM to seek internal review of that request.

Finally, it is significant that, both in April 1989 (at the time Hoyl filed his request for suspension) and in January 1990 (the first time BLM could properly grant the request), there was no application (such as an R2P2 or exploration permit application) pending that required any sort of review. As a result, it cannot be said that Hoyl's right of timely access

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was being denied to him then by the Government. His lack of authorization to proceed can instead be traced to American Shield's withdrawal of the pending R2P2 application in June 1988. 16/

Hoyl complains that Dorchester and American Shield "breached its contracts" by not developing the lease and by withdrawing the pending R2P2 application, but notes that he elected not to resort to litigation to enforce those contractual terms (Petition at 8-9). If such agreement either obliged Dorchester and its successor to develop the leases or prevented it from seeking approval of a plan to mine the leases separately, it was incumberent upon Hoyl to so notify BLM. See Fimple Enterprises, Inc., 70 IBLA 180, 182 (1983); Petrol Resources Corp., 65 IBLA 104 (1982). Although BLM might have been able to preserve the status quo until the parties had an opportunity to settle any such dispute privately or in court (William B. Brice), 53 IBLA 174 (1981), aff'd, Brice v. Watt, No. C-81-0155 (D. Wyo. Dec. 4, 1981), in the absence of such notice, BLM was obliged to consider the requests of Dorchester (and later American Shield) as the legal owner of the leases.

Hoyl also suggests on reconsideration that he is now ready to proceed to develop these leases, using the original plan for developing the leases

16/ It is clear throughout his presentation on reconsideration that Hoyl disagrees with Dorchester's and American Shield's decision not to follow his original scheme or developing these three leases as a unit. He attempts to diminish the authority of Dorchester, which he describes as his "operator," to have taken action to delay development of the leases as a unit (Petition at 6). However, the fact is that Dorchester and (later) American Shield, not Hoyl, was the legal owner of the leases. As lessee of record, they had full authority to take action to develop the lease. See generally 43 CFR Subpart 3482.

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as a single unit. He asserts that plan was approved by BLM in the late 1970's and suggests that BLM's refusal to allow him to proceed as soon as he became lessee of record in January 1990 has denied him beneficial use. It is enough to note that, as BLM points out in its answer on reconsideration it is merely accepted the single-mine plan in 1981 as a concept on which to base it estimates, necessary for adjudicating the applications for preference right leases, of whether the leases could be economically developed in an environmentally safe manner. Hoyl's unified development plan was not submitted as the basis for an actual mining permit for these leases until recently. 17/ Thus, there had been no cognizable administrative delay in reviewing any application either when the request for suspension was filed or when Hoyl became lessee of record.

BLM generally enjoys discretion as to whether to grant an extension of a coal lease under section 39 in the interest of conservation. 18/ That is, the Department "is not required to grant a suspension request whenever application is made, but rather is vested with discretion to deny such a request under appropriate circumstances." Getty Oil Co. v. Clark, 614 F. Supp. 904, 915 (D. Wyo. 1985). A decision by BLM in the exercise of its discretion will not be disturbed on appeal if supported by a rational basis. That Congress authorized the Department in its discretion to grant

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17/ We note that, on or around Jan. 8, 1991, Hoyl applied for an exploration permit and that BLM denied application on Jan. 8, 1991. A revised application was rejected by BLM on Mar. 6, 1991. We are not aware that those rejections have been appealed.

18/ The only exception to that discretion would appear to be where the Government suspends operations and production, as it did in Copper Valley, supra.

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suspensions under section 39 implies that the Department is also authorized by Congress to refuse to grant such suspensions. See United States v. Wilbur, 283 U.S. 414 (1931); Williams v. United States, 138 U.S. 514 (1890). Of course, Congress does not authorize the Department to act arbitrarily. Williams v. United States, supra at 524. However, Hoyl has not established that BLM's denial of the suspension in these circumstances was in error or otherwise constituted an abuse of discretion.

Suspension under Section 7(b) of the MLA Due to Force Majeure Conditions

Hoyl has not effectively challenged our finding that the mine fire in the Fruita No. 1 Mine was not a force majeure within the meaning of section 7(b) of the MLA, 30 U.S.C. § 207(b) (1988). Alfred G. Hoyl, 123 IBLA at 184-87, 99 I.D. at 95-97. In any event, the record confirms both that alternatives to using those entries were available and that the failure to adopt an alternative resulted from adverse economic conditions, which do not constitute a force majeure. Mountain States Resources Corp., 92 IBLA at 193, 93 I.D. at 244-45. Finally, Hoyl has recently submitted information to BLM suggesting that the flooded entries can be reopened at a minimum of expense, sharply undercutting his premise that the closure of those three entries substantially delayed development of the mine.

Estoppel

Hoyl asserts that he relied to his detriment on incorrect statements by BLM to the effect that he would receive an extension of his lease.

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Specifically, he asserts that he spent a great deal of money rehabilitating the leases and returning them to good standing.

First, we note that only actions taken by Hoyl after any alleged misadvice could properly be regarded as having been in reliance on any such misadvice. Most of the $7 million cited by Hoyl was actually expended in the late 1970's, long before he sought BLM's advice regarding suspension of the leases. Two specific expenditures cited by Hoyl, paying overdue back rental and posting adequate lease performance bonds, were liabilities under the terms of the lease that also arose prior to the alleged misadvice and are not properly regarded as having been made in reliance thereon. However, Hoyl does assert that he gave up contractual rights against a "defaulting corporation" (evidently Dorchester/American Shield) in reliance on BLM's alleged representation that his lease would be suspended. We shall presume that is adequate to establish reliance.

Claims of estoppel are considered on the basis of four elements, which are described in United States v. Georgia-Pacific Co., 421 F.2d 92, 96 (9th Cir. 1970): (1) the party to be estopped must know the facts; (2) the party to be estopped must intend that his conduct shall be acted on or must so act that the party asserting estoppel has a right to believe that it is so intended; (3) the party asserting estoppel must be ignorant of the true facts; and (4) the party asserting estoppel must detrimentally rely on the conduct of the party to be estopped. Terra Resources, Inc., 107 IBLA 10, 13 (1989). Estoppel is an extraordinary remedy, especially as it relates to public lands. Estoppel must be based upon affirmative

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misconduct by BLM, and although estoppel may lie if reliance on BLM's statements deprived an individual of a right which he could have acquired, it does not lie if the effect of such action would be to grant an interest not authorized by law.

Decisions of the U.S. Supreme Court have declined to hold that estoppel may not in any circumstances run against the Government. Heckler v. Community Health Services of Crawford, 467 U.S. 51 (1984); Schweiker v. Hansen, 450 U.S. 785, 788, reh'g denied, 451 U.S. 1032 (1981). These same cases, however, have refused to find that the traditional elements of estoppel have been met by the party asserting its protection, thus refuting any impression of hospitality toward claims of estoppel against the Government that earlier cases may have created. See, e.g., United States v. Wharton, 514 F.2d 406 (9th Cir. 1975); United States v. Lazy FC Ranch, 481 F.2d 985 (9th Cir. 1973); and Brandt v. Hickel, 427 F.2d 53 (9th Cir. 1970). In Enfield v. Kleppe, 566 F.2d 1139 (10th Cir. 1977), the basis for asserting estoppel was not merely a letter but a published regulation. Nevertheless, the court held that a Departmental regulation misinterpreting 30 U.S.C. § 226(e) (1988) did not give rise to estoppel even though the party seeking to estop the Government apparently relied upon the regulation and refrained from actions that might have succeeded in extending his oil and gas leases. The court concluded that an administrative provision contrary to statute must be overturned no matter how well settled and how longstanding. Id. at 1142.

Furthermore, estoppel against the Government in matters concerning the public lands must be based upon "affirmative misconduct" such as

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misrepresentation or concealment of material facts. United States v. Ruby Co., 588 F.2d 697, 703-04 (9th Cir. 1978); D.F. Colson, 63 IBLA 221 (1982); Arpee Jones, 61 IBLA 149 (1982). We have expressly ruled that, as a precondition for invoking estoppel, the erroneous advice upon which reliance is predicated must be "in the form of a crucial misstatement in an official decision." Henry E. Krizman, supra; United States v. Morris, 19 IBLA 350, 377, 82 I.D. 146, 159 (1975) (quoting Marathon Oil Co., 16 IBLA 298, 316, 81 I.D. 447, 455 (1974)).

We reject Hoyl's claim of estoppel for several reasons. Hoyl has failed to prove that BLM actively misinformed him. At most, the record establishes that a BLM employee expressed optimism that his request would be granted and advised Hoyl that he would have a better chance of success of prevailing under section 7(b) of the MLA than under section 39. 19/ That was clearly not affirmative misconduct, or misconduct of any kind, as it was far from clear at that time that a suspension was not available. Nothing shows that BLM actively misled Hoyl to believe that he was legally entitled to and would definitely receive a suspension. In other words, applying the relevant judicial standard, we are not persuaded that BLM intended to give the impression that Hoyl could act in reliance on that advice. Moreover, there is no evidence that such advice was in the form of a crucial misstatement in an official decision. To the contrary, it appears that BLM, when approached by Hoyl as to how he might save his leases

19/ Hoyl also asserts that a BLM official told him that he "could see no reason why [Hoyl's] suspension request would not be approved," but acknowledges that that official has denied "stating his advice that positively" (Petition at 4).

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from cancellation, simply offered the possibility (not the certainty) that the leases could be suspended. To hold that BLM's good faith effort to help Hoyl to find a possible solution to his problem binds the Government to grant the request he sought would unduly restrict BLM's ability to offer constructive suggestions to prospective applicants. We decline to do so.

We also hold that it was not reasonable for Hoyl to believe that he would receive an extension. We are aware of no formal statement of position extant within the Department at the time in question on which Hoyl could have relied to support his conclusion that the leases would be suspended.

Additional Issues

Hoyl asserts that "the Department has continued to develop mechanisms and proposals to provide necessary flexibility in its decisions regarding diligent development of federal coal leases," but cites directly only to a proposed amendment to governing Departmental regulations. 56 FR 32002-48 (July 12, 1991). Those amendments have not been yet been promulgated, and there is nothing to indicate whether they will apply retroactively. 20/

20/ In any event, as proposed, those regulations would appear to be of no comfort to Hoyl, as they expressly provide that applications for suspension of operation may be approved only if the applicant demonstrates, among other things, that "the operator/lessee has received authorization to mine and onsite development of the mine has commenced on the lease(s) or [logical mining unit (LMU)] for which the suspension application was filed." 56 FR 32035-36 (July 12, 1991).

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Hoyl's requests for oral argument and a hearing are denied. To the extent not expressly addressed herein, Hoyl's arguments have been considered and rejected.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the petition for reconsideration is granted, and our decision and order are reaffirmed as modified herein.

_____
David L. Hughes
Administrative Judge

I concur:

_____
John H. Kelly
Administrative Judge

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